Frierson Building Supply Company *and* Glendon Kurten *and* Furniture Workers Division, I.U.E. Local 282, AFL–CIO. Cases 26–CA–17643 (formerly 15–CA–14044) and 26–CA–14232 (formerly 15–CA–14232)

July 27, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On December 22, 1997, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed an answering brief in response to the Respondent's exceptions and cross-exceptions to the judge's decision; and the Respondent filed a reply brief in support of its exceptions and an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, only to the extent consistent with this Decision and Order.

The General Counsel alleged in the complaint that the Respondent violated the Act by discharging employees Glendon Kurten and Timothy Adams for engaging in union and protected concerted activities. The judge dismissed the allegations regarding Kurten, but found that the Respondent violated Section 8(a)(3) of the Act by discharging Adams. We agree with the judge that the General Counsel failed to establish that the Respondent unlawfully discharged Kurten. For the reasons set forth below, we find that the General Counsel also failed to establish that the Respondent unlawfully discharged Adams.

FACTS

On November 5, 1996, Furniture Workers Division, I.U.E., Local 282, AFL–CIO (the Union) filed an election petition to represent a unit of the Respondent's employees. Adams was one of the union observers in the December 20, 1996 election. The employees voted against union representation, and no objections to the election were filed.

The Respondent hired Adams as a driver in 1994. Leroy Lawalin supervised Adams. Lawalin counseled Adams numerous times for failing to help with the loading of trucks. In August 1996, the employees complained to management about Lawalin. In response, the Respondent replaced him as supervisor with Robert Lemos. Although Lemos began supervising Adams and others at that time, he did not officially become Adams' supervisor until January 1997.

Shipping Department Manager Larry Pell was not Adams' supervisor, but he had frequent contact with Adams and observed his work habits. In January 1997, Pell complained to newly appointed Personnel Manager John Covington that Adams was wasting time in the shipping department when he should have been helping to load his truck. Pell, at Covington's request, put the complaint in writing.

After receiving Pell's complaint, Covington reviewed Adams' personnel file, which contained numerous complaints. Covington then spoke with Adams' supervisor, Lemos, other supervisors, and coworkers about Adams' performance. Supervisors Lemos and Wilson confirmed, in writing, Adams' poor work habits.

On February 13, 1997, Covington reviewed Adams' personnel file, and decided to terminate him. Covington discharged Adams on February 14, 1997.

THE JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Adams for union and protected activities, rejecting as pretextual "the reasons seized upon by the company." In so finding, the judge recognized that the record contains no direct evidence of antiunion animus. Nevertheless, the judge inferred animus based on the timing of the discharge shortly after the representation election, what the judge found to be an inadequate investigation of complaints against Adams, and the Respondent's toleration of Adams' work habits before the representation election. In finding the investigation inadequate, the judge cited Covington's failure to consult with Lawalin; Covington's utilization of Pell, who was not Adams' direct supervisor, to document a complaint against Adams; and Covington's review of an incomplete personnel file to determine that Adams was unsatisfactory.

ANALYSIS

We agree with the judge that the record contains no direct evidence of antiunion animus. It is well established, however, that inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial as well as direct evidence. See, e.g., *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). For the following reasons, however, we do not agree with the judge that the record supports an inference of animus.

The judge found that Covington's investigation of complaints about Adams was inadequate and therefore suggested animus.

The judge cited Covington's failure to speak with Lawalin. However, Lawalin was not Adams' supervisor at the time of the investigation and had not been so for sev-

[1] The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). To the extent the Respondent and the General Counsel have excepted to the judge's credibility findings, we have carefully examined the record and find no basis for reversing the findings.

eral months. The record contains no evidence indicating that Lawalin would have had recent, firsthand knowledge of Adams' work habits. Lawalin's knowledge of Adams' work habits when he was Adams' supervisor was already documented in Adams' personnel file, which Covington reviewed. Covington did speak with Adams' current supervisor, Lemos, and other yard supervisors who had immediate knowledge of Adams' work habits. Given these circumstances, we find, contrary to the judge, no reason for questioning the adequacy of Covington's investigation based on his failure to talk to Lawalin.

The judge also cited Covington's request for Pell to document his complaint about Adams. However, Covington did not solicit Pell's complaint. Pell approached Covington. Rather than questioning Covington's reaction to Pell's complaint, we find it significant that Covington did not immediately discharge Adams. While it is true, as the judge found, that Covington did not confront Adams, after receiving Pell's complaint he did commence an investigation, which included reviewing Adams' personnel file and speaking with others about his work performance.

The judge also cited to documents missing from Adams' personnel file when Covington reviewed the file. Covington testified that a few excused absences reports and a copy of an envelope addressed to Frierson were not in the file when he reviewed it.[2] The judge suggested that this testimony belied Covington's conclusion that Adams was an unsatisfactory employee. For this to be true, however, we believe the missing documents must, in some way indicate that Adams' work habits were satisfactory, and therefore undercut the conclusion Covington's investigation reached. But, the missing documents have no bearing on Adams' work performance, and the judge himself found that Adams was "not an exemplary employee." We can discern no basis for finding that these missing documents could have had an influence on Covington's investigation. We therefore disagree with the judge's findings that Covington's review of an incomplete personnel file suggests his investigation of Adams' work habits was inadequate and therefore that the reasons given for his discharge were pretextual.

Based on the above, we conclude that the record does not support the judge's finding that the circumstances of Covington's investigation of Adams' work habits support an inference that the Respondent discharged Adams because of his union activity.

Nor do we agree with the judge that the record supports drawing such an inference from the Respondent's past tolerance of Adams' poor work habits before the representation election. Admittedly, Adams' work habits were a longstanding concern. Covington, however, was a new personnel manager who conducted an investigation as soon as Adams' work performance came to his (Covington's) attention and made the discharge decision as soon as it became apparent to him that termination was warranted. See *Lawrence Institute of Technology*, 196 NLRB 28, 30 (1972).

Finally, the circumstances in this case do not warrant inferring animus based on timing alone. In August 1996 the Respondent's employees began engaging in protected concerted activities to improve their working conditions. A union campaign occurred in November-December 1996, culminating in the election on December 20, 1996. There is no evidence of any unlawful or objectionable conduct by the Respondent throughout this period. Shortly after the union campaign, Adams' unsatisfactory work performance came to the new personnel manager's attention. The personnel manager's review revealed a longstanding problem with Adams' work, and the personnel manager decided to discharge Adams.

It is axiomatic that the burden of proof rests on the General Counsel to establish that antiunion animus was a motivating factor in the discharge decision. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The record in this case shows nothing more than that the timing of Adams' discharge shortly after the representation election was a coincidence.[3] Such a coincidence, at best, raises a suspicion. However, "mere suspicion cannot substitute for proof" of unlawful motivation. *Lasell Junior College*, 230 NLRB 1076 fn. 1 (1977). We, therefore, shall reverse the judge's finding that the Respondent unlawfully discharged Adams and dismiss this complaint allegation.

ORDER

The complaint is dismissed.

Rosalind Thomas, Esq., for the General Counsel.
Stephen W. Rimmer, Esq. (Rimmer, Rawlings, MacInnis & Hedglin), and *Rick A. Hammond, Esq. (The Kullman Firm),* for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of a 2-day trial in Jackson, Mississippi, on November 21, 1997, I rendered a Bench decision in favor of the General Counsel (Government) on the allegations related to the discharge of employee Timothy Adams (Adams) thereby finding a violation of 29 U.S.C. § 158(a)(3) and (1); however, I found in favor of Frierson Building Supply Company (Company) on the allegations pertaining

[2] The judge, without elaboration, refers to "a large number of items . . . not in the file." The record shows only that the excused absences records and envelope were missing when Covington first reviewed the file. The February 1997 reports from Lemos and Wilson were not in the file when Covington commenced his investigation, but these documents were not "missing" because they had not yet been created.

[3] Member Brame does not necessarily agree that a discharge occurring 8 weeks after an election can be considered as occurring "shortly" after the election.

to the discharge of employee Glendon Kurten (Kurten) concluding the Company did not violate 29 U.S.C. § 158(a)(1) when it discharged Kurten. I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by the Company, I found the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) when on February 14, 1997, it discharged its employee Adams because of his union and protected activities rather than for the pretextural reasons seized upon by the Company that Adams was not a cooperative employee but one with various disciplinary infractions and warnings, and/or, that he did not perform certain of his regular job duties. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I concluded the Government failed to establish a prima facie case with regard to the discharge of employee Kurten. I concluded Kurten and other employees engaged in concerted protected activities when they discussed among themselves in August 1996 wages, promotions, respect for employees, and certain other concerns with an intention of addressing those concerns with management. The employees selected two employees (neither of which was Kurten) to meet with management on August 26, 1996. The meeting resulted in certain desired changes in working conditions. There was, however, no showing the Company knew that Kurten (or other employees) engaged in protected concerted activities before August 25, 1996. More specifically, I concluded the Company had no knowledge of any concerted protected activities on the part of any of its employees when it discharged Kurten on August 20, 1996. See *Meyers Industries*, 281 NLRB 882 (1986), *Meyers II*, enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).[1] I also concluded that the reasons given by the Company for Kurten's discharge did not warrant an inference it had knowledge of, or was unlawfully motivated in its actions toward Kurten.[2]

I certify the accuracy of the portion of the transcript, as corrected,[3] pages 356 to 370, containing my bench decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in certain particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act. I concluded the Company did not violate the Act in certain aspects of the cases for the reasons stated at trial and summarized above and I shall dismiss those portions of the complaint.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company discriminatorily discharged its employee Timothy Adams, I shall recommend that he, within 14 days from the date of this Order, be offered full reinstatement to his former job or, if that job no longer exists to a substantially equivalent position, without prejudice to his seniority, or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend that the Company, within 14 days from the date of this Order, be ordered to remove from its files any reference to Adam's unlawful discharge and, within 3 days thereafter, notify Adams in writing that this has been done and that the discharge will not be used against him in anyway. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate Notice to Employees, copies of which are attached hereto as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

[Recommended Order omitted from publication.]

APPENDIX A

[Errors in the transcript have been noted and corrected].

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RULING

JUDGE CATES: At the conclusion of the evidence and at the conclusion of closing arguments, I met with the parties for a brief period to explore the possibility of settlement, and it appears settlement is still not an option in this case. So, before I render my decision, let me state that it has been a pleasure to hear this case because it has been well presented from both sides. Whoever wins or loses, the loss or victory, if there is a loss—let me state it that way—it should not be placed at the feet of counsel, because both sides have done a commendable job in presenting the evidence. It makes my job very easy. If you'll recall, all I've had to do in this trial is sit back and listen to the evidence as it has come in. Both counsel for the two parties are a credit to the parties they represent.

Secondly, it has been a pleasure to be in Jackson, Mississippi, because the court facility personnel here have treated each of us with the greatest of care and concern and, if General Counsel, you speak with the people that provided the courtroom and the security, please convey our regards and thanks to them. Company Counsel, if you know any of them, please convey our expression of gratitude to them.

This is my decision. The charge in Case 26–CA–17643 was filed on September 3, 1996 and timely served on the Company.

[1] In *Meyers II* the Board reaffirmed its definition of concerted activity contained in *Meyers Industries*, 268 NLRB 493 (1984), *Meyers I* revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985).

[2] Kurten was a probationary employee who had been written up and suspended prior to his discharge.

[3] I have corrected the transcript by making physical inserts, crossouts, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

That charge was filed by Mr. Kurten as an individual. The charge

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in Case 26–CA–17927 was filed by the Union on February 25, 1997, and was timely served on the Respondent. That charge was filed by the Furniture Workers' Division I.U.E. Local 282, AFL–CIO.

Based on the complaint allegations, the answer herein, and the testimony, in particular of Mr. Box, I find the Company is a corporation with an office and place of business in Jackson, Mississippi, where it is engaged in the operation of a building supply service. I further find that during the period ending—the 12-month period ending on May 31, 1997, the Company, in conducting its business operations, sold and shipped from its facility in Jackson, Mississippi, goods valued in excess of $50,000 directly to points outside the State of Mississippi. During that same 12-month period of time, ending May 31, 1997, the Company purchased and received at its Jackson, Mississippi, facility goods valued in excess of $50,000 directly from points located outside the State of Mississippi. I find that at all times material herein, the Company is an employer engaged in commerce within the Section 2(2), (6), and (7) of the Act. I find that at all times material herein, the Furniture Workers' Division I.U.E. Local 282, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act. I find, based on the complaint allegations and the answer thereto, including the testimony of those who testified in this proceeding, that the following individuals are supervisors and agents of the Company within the meaning of the Act. I find

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that Mr. Pete Frierson is the President and stockholder of the Company; that Mr. Jerry Ketteringham is the Credit Manager and Assistant General Manager—that is based upon not only the admissions but his testimony in this proceeding. I find that Mr. Mike Covington is the Credit Manager and Assistant Manager and a supervisor and agent within the meaning of the Act, based not only on the admissions but upon his testimony herein. I find that Messrs. Leroy Lawalin and Robert Lemos are supervisors and agents of the Company within the meaning of the Act, and they served as Yard Foremen and/or Assistant Foremen.

There are certain facts in this proceeding that are not in dispute, and I shall set forth at least two of those obvious ones to begin with: that Mr. Kurten was discharged on or about August 20, 1996; and that Mr. Timothy Adams was discharged on or about February 14, 1997.

Having gotten those preliminary findings out of the way, I come to the crux of the case. The case involves the discharge of the two individuals, Mr. Kurten and Mr. Adams, and I shall address the two discharges in the order of Mr. Kurten first and Mr. Adams second, simply because that is the order in which they appear in the complaint and also it is chronologically the way I feel it should be approached.

With respect to Mr. Kurten's discharge, the first issue that must be resolved is, did Mr. Kurten engage in concerted activity that is protected by the Act? In addressing that

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issue, I shall look to the Board's teachings in Meyers, M-Y-E-R-S, Industries (Meyers 1) and (Meyers 2). Meyers 1 is reported at 268 N.L.R.B. 9443, a 1984 case, and Meyers 2 is reported at 281 N.L.R.B. 282, a 1986 case. The Board in Meyers noted that the concept of concerted action has its basis in Section 7 of the Act. The Board pointed out in Meyers 1 that although the legislative history of Section 7 of the Act does not specifically define concerted activity, it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The statute requires that the activities under consideration be, "concerted" before they can be "protected." As the Board observed in Meyers 1, "Indeed, Section 7 does not use the term 'protected concerted activities' but only 'concerted activities.'" It goes without saying that the Act does not protect all concerted activities. With the above guidelines, as well as other considerations in mind, the Board in Meyers 1 set forth the following definition of concerted activity. I am quoting now from Meyers 1. "In general, to find an employee's activity to be concerted, we shall require that it be engaged with, on, or with the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found. If, in addition, the Employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the act, and

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the adverse employment action at issue (for example, discharge) was motivated by the employee's protected concerted activity."

Applying those guidelines to the instant case, I shall address each of the elements required for the Government to establish a prima facie case. Was the conduct that Mr. Kurten engaged in concerted activity? The answer to that question is, I think, very clear: Yes. The employees were discussing among themselves concerns with an object of having those concerns addressed by Management. The subject matters discussed were, among others, wages, respect for the employees, supervision, in this case, particularly of the shipping yard, and promotions. The fact that this was of a concerted nature is further demonstrated by the testimony of various of the Company officials when they stated that, as a result of this meeting changes were made in communication between Management and the employees; changes in the supervision of the yard; that evaluations were brought into existence; and certain individuals were given pay increases.

Was this concerted activity that was protected by the Act? The answer again is, yes. The Board, in cases from its very inception, has concluded that discussion among employees of wages, working conditions, and supervision is clearly matters that are protected by the Act.

Was it concerted and protected? The answer is, yes. The employees were banning together. In fact, they had indicated—

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they being the employees—they would not take the trucks out on the morning of August 26th unless their concerns were addressed. Without going into that at great length, the Company met with the two designated spokespersons for the employees, and I believe both of the Company's representatives testified they knew these two individuals were speaking on behalf of the other drivers, because they told them, look, we're going to meet with you as long as it takes, all day, all night, all week, but you've got to do a little something for us; you've got to go down and persuade your fellow workers to take the trucks out while we are discussing the concerns you wish to raise with us.

The next element of the prima facie case is, did the Company have knowledge of the concerted nature of the employees' activities at the time it took adverse action? And, in this case, the answer is, no. There is no evidence the Company had knowledge of a direct nature that Mr. Kurten or the others were engaged in concerted protected activity before it discharged Mr. Kurten.

The next element of the four-part finding for a prima facie case is the question of whether the Company was motivated by the employees' protected concerted activity in taking the action it did, and in this particular case, the discharge of Mr. Kurten. The answer is, no, because the Company had no knowledge, demonstrated in this trial, of any activities on behalf of

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Mr. Kurten and the other employees before Mr. Kurten was discharged. Now, it is true, as the General Counsel pointed out, that someone contacted Mr. Box on August 25th and informed him there was going to be a meeting on August 26th, and the employees were not going to take their trucks out on the road without their grievances, for a collective way to refer to it, being addressed. But, there is no showing the Company or its supervision had any knowledge prior to August 25. Each of the Company officials denied any such knowledge. It is clear from the evidence that Mr. Kurten and the others made it an effort to keep the matter secret or away from the Company.

Do the reasons advanced by the Company for Mr. Kurten's discharge warrant an inference it had knowledge of Mr. Kurten's activities? Again, the answer is, no. Mr. Kurten was a probationary employee. He had been written up and suspended. He was a low-level employee—that is, a driver's helper. He had little, if any, seniority because he was still in the probationary period, and there was no challenge by the Government that others were not laid off at the time that Mr. Kurten was either discharged or laid off. Mr. Kurten had been involved in at least a couple of accidents, one that dealt with where a Company truck backed into a vehicle, and the other where some wire came off of a truck. Yard Foreman Lawalin testified that before he took the action he did with respect to

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Mr. Kurten that he looked at his personnel file and told Mr. Kurten he was being "laid off" rather than "discharged" because he did not want to damage Mr. Kurten's attempts to find employment elsewhere, and he wanted to assist Mr. Kurten in drawing unemployment. Although I found Mr. Lawalin to be, from his own testimony and from the testimony of others about him, to be a gruff, hard-nosed, long-term supervisor, I'm persuaded he had enough compassion, if that be the appropriate word, to at least make the paperwork that severed the relationship between the Company and Mr. Kurten such as to do the least harm to Mr. Kurten. I shall recommend that the complaint be dismissed with respect to the allegations that the Company violated the Act when it discharged Mr. Kurten.

I do that because the Government failed to establish a prima facie case in that it failed to supply two of the elements needed to establish a violation, namely that the Company knew or had knowledge of the concerted nature of Kurten and the others' activities at the time it discharged him, and there is no evidence the Company was motivated by any unlawful means or manner. So, I find the Government failed to make a prima facie case with respect to Mr. Kurten. But, even if the Government had established a prima facie case, I would find the Company met its burden of showing it would have selected Kurten anyway, and for the reasons I enumerated

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earlier, that he was a probationary employee; that he had been written up and suspended; he had an entry-level position with no seniority; and he had been involved in accidents at the Company. So, I think the Company has demonstrated it would have selected him anyway. But, I need not reach that, because I am persuaded that the Government failed to make a prima facie case with respect to Mr. Kurten.

Next, I come to Mr. Adams. The analytical mode for determining cases involving the motivation of the Employer is outlined by the Board in a case called Wright, W-R-I-G-H-T, Line, L-I-N-E, reported at 251 N.L.R.B. 1083, a 1980 case. That was enforced at 662 F.2d 899, the First Circuit Court of Appeals in 1981, and certiorari was denied in the Supreme Court in 455 U.S. 989, a 1982 case. The analytical mode for resolving discrimination cases turning upon the Employer's motivation is governed by the following test: The general counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Employer's decision. Once accomplished, the burden shifts to the Employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well-settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved.

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Under certain circumstances, the Board will infer animus in the absence of any direct evidence. That finding may be inferred from the record as a whole. A prima facie case is made out where the general counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement, which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. Once the general counsel has made out a prima facie case, the burden shifts to the respondent. That burden requires that the respondent, to establish its Wright Line defense, do so only by a preponderance of the evidence. The respondent's defense does not fail simply because not all of the evidence supports it, or even because some of the evidence tends to negate it.

As I have indicated earlier, there is no question that Mr. Adams was discharged on February 14th, 1997. The first element of the Government establishing a prima facie case is, did Mr. Adams engage in union or concerted activity? And, the answer is, yes. Mr. Adams was involved in activities on behalf of the Union, and the Company readily acknowledges that. Among other things, Mr. Adams served as the observer for the Union at

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the Board-conducted election.

Did the Employer have knowledge of Mr. Adams' Union activities? And, the answer is, yes. There is no question about

that. Mr. Adams' presence as a union observer at the election, among other things, would indicate to the Company knowledge of Mr. Adams' Union activities.

Was adverse action taken against Mr. Adams? And, the answer is, Yes. Mr. Adams was discharged, without dispute, on February 14, 1997.

The question then comes, has there been animus demonstrated? And, perhaps not the direct evidence of animus that is sometimes present in cases, but I am persuaded the Government has met its burden with respect to animus regarding Mr. Adams' discharge, and I do that based on a number of inferences that I draw. First, the timing of the discharge is suspect. If you follow the chronology of events, you will find that a petition for an election was filed on November 5, 1996. An election was held on December 20, 1996, which the Company won, at which Mr. Adams served as an observer. A period of time following that election was open to challenge by objections. None were filed. In either the late part of January or the early part of February, the Company, and specifically Credit Manager and Assistant Manager Covington asked Mr. Pell to write up Adams, and Mr. Pell complied. And, that is set forth in Respondent's Exhibit No. 3, pages 1, 2, and

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3. Now, Mr. Pell was asked to write up Mr. Adams, even though Mr. Pell was not his direct supervisor. And then, shortly thereafter, being February 14th, Mr. Adams was discharged. Before Mr. Adams was discharged, Mr. Covington testified he reviewed his file and concluded Mr. Adams was not doing his job. Now, if you look at the file Mr. Covington says he reviewed, a large number of items were not in the file at the time he reviewed it, yet he concluded Mr. Adams was an unsatisfactory employee. And, when he discharged Mr. Adams, he told him he regretted having to terminate him for not doing his job, and that the exit interview was short and sweet. Mr. Adams, on the other hand, testified he was told that he didn't think he had to perform his job after the Union election. I don't credit that particular statement of Mr. Adams, because it wasn't in his affidavit, and I'm just persuaded that did not take place in that conversation. I am nonetheless convinced the Government established a prima facie case, based on the timing of the discharge, and on the failure to adequately investigate the discharge. Before discharging Mr. Adams, Mr. Covington did not confront Mr. Adams with any of the matters, and more telling than that is that, Mr. Covington did not speak with Yard Foreman/Supervisor Mr. Leroy Lawalin, who would probably have had the closest opportunity to have observed all of the work of Mr. Adams.

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Also, I draw an inference of animus from the fact the Company had tolerated Mr. Adams' work habits. And, let me add that I do not view Mr. Adams as an exemplary employee; I think the record clearly shows he is not. But, the Company had tolerated Mr. Adams' not helping load the trucks or being in the coffee room taking breaks or being down in the shipping room not performing work. I'm persuaded the Company discharged Mr. Adams because of his union and protected conduct, and I'm persuaded the Company failed to demonstrate it would have discharged Adams notwithstanding any Union or protected activities on his part. The Company would contend that there is no animus, and hence, there cannot be a violation of the Act because, among other things some of those who were the most outspoken at the Company, being Mr. Kent among others, was still employed by the Company and had, in fact, been promoted. Well, I don't think that distracts from the fact Mr. Adams' conduct was tolerated, or that the Company didn't adequately investigate the circumstances before they discharged him, and particularly the timing of the discharge. So, the mere fact that the Company has not taken action against, for example, Mr. Kent or Mr. Bailey does not, in my opinion, exonerate it from the actions taken against Mr. Adams.

With respect to tolerating Mr. Adams' work habits, Mr. Williams, an employee called by the Company, testified this was an ongoing and long-term problem. Mr. Willie

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Thomas, an employee called by the Company, indicated that this had been a long-time problem. So, accordingly—I find the Company violated the Act when it discharged Mr. Adams, and I shall order: that Mr. Adams be reinstated; that he be made whole; that the Company post a notice; that the Company expunge from its files any reference to Mr. Adams' unlawful discharge; and that the Company not violate the Act in any like or related manner.

Again, in so doing, I am fully aware that Mr. Adams was not an exemplary employee; but I'm fully persuaded the Company discharged Mr. Adams as a result of the activities he engaged in. And, I shall order the corrective action I have indicated.

Now, when the court reporter serves the transcript on me, I will certify this decision, and in doing so, I will attach those pages of the transcript that constitute my decision. I will make whatever corrections are necessary, or that I deem necessary, on the actual transcript itself. I will do it with inked in corrections, and I will attach the transcript pages to the certification decision that I will issue.

It is my understanding that the period for taking exceptions or appealing my decision, as either or both of you may wish to do, runs from that time period; however, please

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consult the Board's rules and regulations for the timely filing of exceptions or appeals if either of both of you wish to do so. Please rely on the Board's rules and regulations, but I think the time period for appeals runs from the certification of my decision. The court reporter normally provides the transcript to me within ten to fourteen days, two weeks, or whatever. I think they are under contract to complete it in ten days, and I get it within fourteen days, three weeks, somewhere in that neighborhood. So, you may expect the certification reasonably soon after that.

And, let me again say that it has been my privilege to hear this case. If the parties would still like to resolve this case, I would urge them to do so. If not, the decision has been rendered and will stand. And, with that, this hearing is closed.

(Off the record; hearing closed.)